Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	
Review of the Commission's Rules Governing the Low-Power Television Service	MM Docket No. 93-114 RM-7772

COMMENTS OF SMITH AND POWSTENKO

The subject of the above-captioned proceeding is of importance to the firm of Smith and Powstenko and to a number of its clients. Accordingly, we submit these comments in response to the Commission's *Notice of Proposed Rule Making*, in which the Commission is proposing, among other things, changes in application acceptance standards, the definition of a "minor" change, and the expanded use of terrain shielding arguments.

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"Letter Perfect" Standard

With respect to the FCC's proposed acceptance standards, it is this firm's belief that the "letter perfect" standard now in place is no longer necessary. This standard was instituted to help eliminate sham and speculative filings, which created a significant processing backlog during the early 1980s. That backlog has essentially been eliminated through the diligent work of the LPTV Branch, as well as through the adoption of lottery procedures to select a permittee from a group of mutually exclusive applicants and the implementation of Rules which restrict not only the times during which an application for a new facility can be filed (filing windows), but also the number of new applications a given entity may file during such a window.

Under the "letter perfect" standard, the engineering portion of the application may not contain any errors, and the proposed station must meet stringent interference parameters. The Commission proposes to replace the "letter perfect" standard with a "substantially complete" standard, under which certain types of errors in an application could be corrected in one perfecting amendment.

There are two types of errors commonly found in the engineering portion of an application: (1) those that are typographical, mathematical, (such as the calculation of ERP or the conversion of feet to meters), or neglectful in nature and (2) those that result from incorrect determinations of interference to authorized and proposed television stations, such as the

use of an incorrect channel or offset designation. More important than the type of error is the question of whether or not the original application is mutually exclusive with other applications tendered during the same window, and whether or not the correction of the error results in changes in mutual exclusivity (lottery groupings).

Let us say, for instance, that two applicants, Applicant A and Applicant B, both specify the same channel for communities separated by 50 miles. Each has specified a different offset, and the applications are not mutually exclusive. However, it is found that Applicant A made a mistake and specified "minus" offset, which results in calculated interference to an existing full-power station.

Under one scenario, Applicant A might be allowed to amend his application to specify "plus" offset. Since Applicant B had already specified "plus" offset, Applicant A's newly proposed facility becomes mutually exclusive with Applicant B's facility, and both are slated for lottery. Applicant B has been slighted by the proposed new Rules, since under the old Rules Applicant A would have had his application dismissed for causing interference to a full-power station, and Applicant B would have been granted a Construction Permit outright. Under the proposed new Rules Applicant B might lose his facility in a lottery.

Or, under the same scenario, where two applications were not mutually exclusive initially, they could become so, due to corrections to an application which result in greater height or power.

Any sort of error should be amendable without regard to whether the resultant change is "major" or "minor," as long as the essence of the error and the intent of the applicant is evident to the person processing the application, and as long as the result of the amendment does not create a new lottery grouping. In addition, if the original application is mutually exclusive with one or more other applications, the correction to be made cannot result in enlarging the lottery grouping beyond that which had originally obtained.

Another type of error we have noted from time to time results from errors in the official FCC data base. For example, a full-power television station's coordinates might contain an error that places the station much farther from the proposed LPTV facility than is actually the case. The engineer will then design the LPTV facility based upon an incorrect mileage separation. However, if the data base is corrected by the time the LPTV staff begins to process the proposal, the LPTV application will be returned without opportunity for amendment.

The same problem occurs when an LPTV Construction Permit that has been cancelled and its call sign deleted is reinstated by the LPTV Branch, and the action occurs too close to a window to be entered into the FCC data base, which usually is not available to the public until 30 days or so after its publication date. This office has had a number of applications returned for just this reason.

While nobody can expect a data base to be perfect, one should have

the right to resubmit an application if the reason for dismissal is found to be due to an FCC data base error. We suggest that if it can be shown that a defective application's engineering was based upon wrong information contained in a recent version of the FCC's database (say, one dated no more than 45 days prior to the opening of the LPTV window), the applicant would have the right to amend his application, including the selection of a new channel if necessary, as long as the amendment did not create any mutual exclusivity with another application filed during the window. However, only the FCC's data base must have been relied upon in such a case, since the FCC cannot not speak for the accuracy of other such databases.

We also suggest, as an adjunct to this Rule, that the LPTV Branch consider any request for the reinstatement of a cancelled Construction Permit that is filed within 60 days before the opening of a filing window to be a "major" change and therefore subject to competing applications filed during that window.

We believe that the implementation of these measures will help to lessen the significant number of returned applications from any given filing window while preserving the integrity of the system which the LPTV Branch uses so effectively to maintain high engineering standards.

Terrain Shielding

The FCC proposes to expand the number of circumstances under which an applicant may request waiver of the interference rules where there is

significant intervening terrain. Specifically, the FCC proposes to permit two applicants who would normally be slated for lottery to extricate themselves from that proceeding, as long as there is a significant terrain barrier between the two sites. Our firm supports the use of terrain shielding under such circumstances. The FCC might further standardize this waiver Rule with a more exacting definition of the minimum showing required of applicants requesting terrain waivers. A minimum showing might include, for example, terrain profiles along the site-to-site azimuth and along the azimuths tangent to the boundaries of the protected station's contour, plus intermediate profiles separated by no more than 10 degrees.

With respect to mutually exclusive situations wherein one or more parties subsequently requests processing under a terrain shielding waiver and submits the appropriate documentation, the FCC should utilize its detailed propagation analysis program to determine the extent of each station's interfering signal within the others' protected contour, taking into account terrain effects. If the computer program indicates no interference in excess of that permitted under present Rules, all applications should be slated for grant. If the interfering signal of any station is within 10 db of the interference standard, a letter of agreement should be required of all parties. Such letter should require that all parties work together to resolve cases of actual interference, despite which station goes on the air first. Where the interference is more than 10 db greater than that permitted by the Rules, the FCC ought to consider such interference excessive and

proceed by lottery as scheduled.

Too often, applicants don't realize what commitments they may be making when trying to extricate themselves from a lottery. Chances are that if predicted interference is more than 10 db greater than the threshold shown in the FCC Rules--which is calculated from a very sophisticated propagation model--then interference will indeed occur, and there will be little that an applicant can do to alleviate it. The FCC is certainly aware that LPTV Construction Permits are often sold, and a permittee trying to sell an extricated CP might tell the buyer little, if anything, about a likely interference situation.

Another aspect of the current terrain shielding policy is that if a filing window produces two mutually exclusive applicants who would be slated for lottery, but one applicant had requested a terrain shielding waiver, the FCC ignores the request and processes the application without the waiver, which causes that applicant's proposal to be returned by the FCC. As a result of this policy, we have suggested to clients who are filing for a new facility that their application not contain a terrain shielding waiver request, in the event that a mutually exclusive application is filed during the same window. We suggest that, once they receive a Construction Permit and build the station, they file an upgrade application, with a terrain shielding waiver request, during a subsequent window, since the likelihood of a competitor filing a mutually exclusive application against a major modification application is considerably less than in the

case of a new application. We support the abolition of this restrictive Rule, since it will reduce the number of major modifications prepared by this office and eliminate these unnecessary applicant expenses.

Definition of "Minor" Modification

Presently, a "minor" change is one which results in no increase in the protected contour of an LPTV station. Under the proposed approach, a station's limiting contour would be defined as a circle whose center point is the site of the authorized facility, and whose radius is the greatest distance to the authorized facility's protected contour, no matter what the azimuth. Such a relaxation of the "minor" change Rules will require that each application pass the interference protection test that the FCC currently applies to new, major change, and displacement applications. We support this revision for two reasons. First, it provides the permittees more site and antenna options than do the present Rules. Often, a Construction Permit will specify a highly restrictive antenna, meaning that it has a substantial null in one direction. Perhaps the original applicant had such an antenna on hand when he first applied for the station. Perhaps the engineering reason for having the deep null is no longer germane, *e.g.*, protecting a closely spaced LPTV Construction Permit that has subsequently been cancelled. Perhaps the specified antenna must still be used, but the trans-

new Rules would allow the permittee, in some instances, to select a different antenna than the highly restrictive one authorized, or to relocate to a different site with the same antenna.

In addition to the restrictions that a particular antenna can place on modifications, so, too, can transmitter sites located in mountainous terrain. The newly defined protected-contour Rules would benefit such permittees, as well.

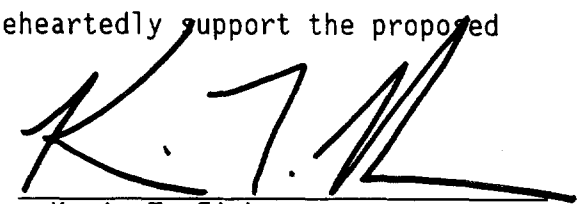
Another advantage of revising the "minor" modification definition is that permittees will be forced to confront their interference problems at the time they apply for a minor modification rather than doing so only when filing a major modification application during a window. Too often nowadays, a permittee makes short-term engineering concessions in order to file a minor modification application, in the hopes of regaining his lost service area with a major modification application during a window, only then to find that, due to interference reasons, he is precluded from applying for the major modification and is saddled with an inferior facility. The new Rules would help to prevent this from happening and allow for better station strategy between windows.

Our only concern involves permittees making such changes within sixty days of a filing window. Such changes may not make it into the FCC data base soon enough to prevent the filing of applications that are mutually exclusive with the newly modified facilities. The FCC should either restrict the filing of expanded-area minor modification applications once a

window has been announced, or consider the modification a "major" one during that period and let it be subject to competing applications filed during the window. Traditional minor modification applications, which do not extend the authorized service area of a station, should continue to be fileable at any time.

Summary

Each of the proposals contained in this Rulemaking proceeding has considerable merit. In one way or another, they would all benefit the low-power television industry. By relaxing its hard-look acceptance of applications, the LPTV Branch would ensure that a greater number of stations could be granted Construction Permits after a given filing window. The broader use of terrain shielding waivers would produce a similar result. The newly proposed definition of a "minor" modification means that fewer stations will have to wait for a filing window in order to specify a proper antenna or site and so be able to get on the air within the allowable time. With the few caveats mentioned above, we wholeheartedly support the proposed regulations.



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